

IN THE COURT OF APPEALS OF IOWA

No. 6-009 / 94-2058

000279

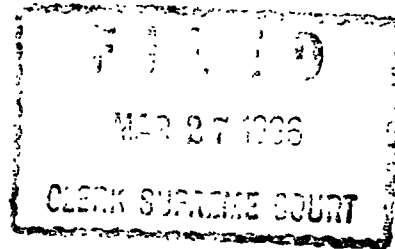
STATE OF IOWA.

Plaintiff-Appellee.

vs.

JOHN WAYNE KIRSCH,

Defendant-Appellant.



Appeal from the Iowa District Court for Decatur County, James W. Brown,
Judge.

Defendant appeals his convictions for one count of first-degree theft, seven counts of second-degree theft, and one count of third-degree theft in violation of Iowa Code sections 714.1 and 714.2 (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Carol Clark, County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Defendant John Kirsch appeals from his convictions of one count of first-degree theft, seven counts of second-degree theft, and one count of third-degree theft. He challenges the sufficiency of the evidence to support three of the convictions and claims his trial counsel was ineffective. We affirm with respect to his challenge to the sufficiency of the evidence, and preserve his claim of ineffective assistance for postconviction proceedings.

I. Sufficiency of the Evidence. The State charged defendant with the theft of (1) cattle belonging to Gary Naylor; (2) nine head of cattle stolen from Galen Slye; (3) two head of cattle stolen from Harley Griffieon; (4) two head of cattle stolen from Eldon Still; (5) two head of cattle stolen from David Leih; (6) a Kubota tractor; (7) a Heston hay baler; (8) a Massey Ferguson hay conditioner and mower; and (9) a Dakon gravity flow grain wagon. On appeal, defendant challenges the sufficiency of the evidence to support his convictions on three of those counts -- the theft of Gary Naylor's cattle, the theft of David Leih's cattle, and the theft of the Kubota tractor.

When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38. Substantial evidence is evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond

a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

(a) Gary Naylor's Cattle. Defendant claims the State failed to prove he took possession and control of Gary Naylor's cattle. Around October 1, 1993, Naylor learned nine head of his cattle were missing. Naylor testified he was missing four black white-faced cattle, four red-necked white-faced cattle, and one Simmental. All nine cattle were branded with either a "PC" brand or an "S" brand and weighed around 550 to 600 pounds.

On October 23, 1993, Sharon Holtry discovered nine head of cattle on her property that did not belong to her. The nine calves weighed between 500 and 600 pounds. After contacting the sheriff's office, she ran an advertisement in the local paper which read, "FOUND: CROSSBRED calves. Identify & pay expenses. 763-2206."

On November 7, 1993, defendant stopped at Holtry's farm to respond to the advertisement. Defendant told Holtry he was missing nine head of cattle and he described them as four black white-faced, four red white-faced and a Simmental cross. He said the calves weighed 500 to 600 pounds. He did not mention any brands, and he inaccurately claimed the cattle had yellow ear tags.

Defendant told Holtry he was keeping the cattle for a friend, Paul Topliff, who was going through a divorce and did not want his wife to know he had the cattle. Defendant also told Holtry he had been keeping the calves at the Ricketts' place, a farm approximately five miles from Holtry's farm.

Holtry called the Ricketts to verify this information. Ms. Ricketts told her as far as she knew their land was not rented and had no cattle on it. Defendant then told Holtry he was not in the area very often and had not yet had an opportunity to tell the Ricketts he was using their land. Defendant did not identify the calves to Holtry's satisfaction, so she called the sheriff. A deputy contacted Naylor and accompanied him to Holtry's farm. Naylor identified the nine cattle as his.

The State concedes there is no direct evidence to establish defendant ever possessed Naylor's cattle. However, direct and circumstantial evidence are equally probative, Iowa R. App. P. 14(f)(16), and a jury verdict of guilty can be supported by circumstantial evidence alone. *State v. Torres*, 506 N.W.2d 470, 472 (Iowa App. 1993). There was substantial circumstantial evidence to support defendant's conviction for the theft of Naylor's cattle.

Naylor testified his fences were in good condition and his missing cattle did not walk away from his property. Naylor's employee noticed the gate on Naylor's corral had been wired closed completely different from the way the employee had left it. Naylor's neighbor, Mr. Julian Toney, had observed defendant behaving suspiciously before Naylor's cattle were stolen. The neighbor had seen defendant

driving his pickup truck by Naylor's property as often as eight times a night on numerous evenings. The neighbor also saw defendant driving his pickup truck to Naylor's corral and walking through the corral gates. Another witness testified that at approximately the time Naylor's cattle were stolen, he saw defendant driving a pickup one night and hauling a trailer with calves in it.

Holtry's son had observed defendant in the vicinity of the Holtry residence several days before defendant attempt to claim the cattle from Holtry. When Holtry was not satisfied with defendant's identification of the cattle, she called the sheriff and defendant attempted to leave her property. His exit was blocked by Holtry's children.

Just as he told Holtry, defendant told a Madison County deputy sheriff he had taken possession of his friend Paul Topliff's cattle in order to hide them from Topliff's wife during their divorce. Paul Topliff testified he did get divorced in 1993, but he had not left any cattle with defendant. From this, the jury could have inferred defendant lied to explain his possession of the cattle and his lies were indicative of his guilt. *See State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993)(false story told by defendant indicates consciousness of guilt); *State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982)("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt.").

There was substantial circumstantial evidence from which the jury could infer defendant had Naylor's farm under observation and stole nine head of cattle which

were placed on the Holtry land. When Holtry discovered the extra cattle, defendant responded to her advertisement and tried to claim them. His explanation he had been holding the cattle on the Rickett's land for his friend Paul Topliff was refuted by the State's evidence. There was sufficient evidence from which the jury could find defendant had taken possession and control of Naylor's cattle.

(b) David Leih's Cattle. Defendant argues no rational juror could have found beyond a reasonable doubt he had exercised control over a cow belonging to David Leih. David Leih testified he discovered two of his purebred Limousin cows were missing in April 1993. He checked his fences and found no breaks. The missing cattle were tattooed with a herd prefix and registration number.

In November 1993, after defendant had been arrested for the theft of the Naylor cattle, officials inventoried and seized cattle located on farms rented by defendant. The seized cattle were taken to the Leon sale barn and efforts were made to trace their owners. Leih went there and presented his registered papers to a Decatur County deputy sheriff. Leih identified one of the seized cows as his based on the tattoo in its ear.

A defendant's unexplained possession of recently stolen property justifies an inference he illegally received it. *State v. Selestian*, 515 N.W.2d 356, 358 (Iowa App. 1994). The characterization of an item as "recently stolen"

is not necessarily measured by the number of hours or days or weeks involved. The nature of the articles, and the circumstances of the case are pertinent elements. The length of time is a question to be

considered by the jury together with all other factors in the case. As to the character of the stolen goods it depends to some extent on whether they are readily and easily transferable; light or heavy; easy or hard to identify.

State v. Brightman, 252 Iowa 1278, 1282-83, 110 N.W.2d 315, 317 (1961) (citations omitted). While the *Seleston* and *Brightman* cases involved a defendant's possession or receipt of stolen property, we find their legal principles applicable to a defendant charged with the actual theft of the property.

There was sufficient evidence from which the jury could find defendant had stolen Leih's cow. Leih's testimony established his cattle had been stolen and had not strayed away. One of the cows was found on a property rented by defendant. The stolen property was easily identifiable by its tattooed registration number and such property would not have been readily transferable. The unexplained presence of Leih's stolen cow on property rented by defendant was sufficient evidence defendant had exercised control over it.

(c) *Kubota Tractor.* Defendant claims there was not sufficient evidence to prove he exercised control over the Kubota tractor and knew it was stolen. One of the owners of the tractor testified the tractor disappeared from a construction job site on June 17, 1993. He reported it stolen, and there was evidence at trial the value of the tractor at the time it was stolen was \$12,435.

The tractor was subsequently recovered at Ricky White's farm in Leon, Iowa. Ricky White testified he was a friend of defendant, and defendant would occasionally

stay at his home and would often leave farm equipment on White's property. White testified he had previously seen the tractor at Jim Toney's house and Toney told him defendant would use it to clean out lots for Toney. Approximately one year before the August 1994 trial, defendant and another man had tried to sell the Kubota tractor to White for \$1500. White did not testify defendant brought the tractor to White's farm. However, White testified he personally had not brought the tractor onto his property.

There was sufficient evidence from which the jury could find defendant knew the tractor was stolen and exercised control over it. An eyewitness, White, testified defendant used the tractor at Toney's house and defendant and another man had offered to sell the tractor to him. This conduct infers defendant exercised control over the property.

Defendant's knowledge the tractor was stolen can be inferred from the evidence he attempted to sell it for far less than its market value shortly after it had been stolen from the construction site. *See State v. Knapp*, 426 N.W.2d 169, 175 (Iowa App. 1988). There was sufficient evidence to support defendant's conviction for the theft of the Kubota tractor.

II. Ineffective Assistance of Counsel. Defendant argues his trial counsel was ineffective in failing to object to the admission of evidence of defendant's involvement in other crimes. Specifically, defendant contends his counsel should have objected to the State's presentation of evidence attempting to link defendant with

the theft of cattle from Richard Graham and Richard Derscheid. These alleged thefts were not among the charges for which defendant was being tried.

Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied*, 459 U.S. 841 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

Trial counsel may have had strategic reasons for not objecting to evidence pertaining to the Graham and Derscheid thefts. He may have wanted to emphasize the tenuous nature of the State's attempts to link defendant to both charged and uncharged thefts. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). We conclude there is presently an inadequate record to adjudicate defendant's claim and we reserve it for postconviction proceedings.

AFFIRMED.